Supreme Court, U.S.
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NO. 02-1678

IN THE SUPREME COURT OF THE UNITED STATES

LARRY SMALL; R. SCHELKE; E. CASTRO; D. JOHNSON; M.A. CORBIN; J. BUILTMAN, *Petitioners*,

v.

NARVIS G. NONNETTE, *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a state prisoner's 42 U.S.C. § 1983 action for damages is barred where success would necessarily imply the invalidity of a prison disciplinary proceeding and plaintiff, who paroled after judgment and elected not to challenge the disciplinary proceeding in habeas corpus while the remedy was available to him, is currently ineligible for relief in habeas corpus.

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v.

NARVIS G. NONNETTE, *Respondent.*

I.

THE DECISION BELOW CONFLICTS WITH THIS COURT'S JURISPRUDENCE AND DEEPENS AN EXISTING CIRCUIT SPLIT

In opposition to the certiorari petition, Respondent insists the decision below does not conflict with this Court's civil rights and habeas corpus jurisprudence because it is consistent with dicta by five concurring and dissenting Justices in *Spencer v. Kemna*, 523 U.S. 1 (1998). (Opp'n at 1-4.) As the petition illustrates, however, *Spencer* is inapplicable and the Court of Appeals' decision directly contravenes established precedent from this Court in *Preiser v. Rodriguez*, 411 U.S. 475 (1973), *Heck v. Humphrey*, 512 U.S. 477 (1994) and *Edwards v. Balisok*, 520 U.S. 641 (1997). (*See* Pet. at 5-11, 20-21.) Further, Respondent fails to address Petitioners' argument that the decision below disregards this Court's clear caveat that lower courts follow directly applicable precedent rather than

engage in the dubious practice of relying on dicta from concurring and dissenting opinions to conclude this Court's jurisprudence has changed. (*See id.* at 10, 13-14 (citing *Agostini v. Felton*, 521 U.S. 203, 237 (1997); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989)).) More importantly, Respondent acknowledges the "open question" in this case divides the circuits. (Opp'n at 4.) Consequently, the issue is ripe for plenary review by this Court. *See* Sup. Ct. Rule 10(a), (c).

II.

PETITIONERS RAISED "PROCEDURAL DEFAULT" BELOW

In his opposition, Respondent also suggests that Petitioners mention, for the first time, "procedural default" as a means to preclude his § 1983 action. (Opp'n at 5 n.1.) Not so. Indeed, Petitioners' argument throughout this action has been Respondent's failure to comply with the "favorable-termination rule" prescribed by *Heck* and *Edwards* operates as a procedural default.

III.

THIS COURT'S RECENT GRANT OF CERTIORARI IN ANOTHER MATTER MAKES REVIEW OF THE NINTH CIRCUIT'S DECISION HERE EVEN MORE APPROPRIATE

After Respondent filed his opposition, this Court granted certiorari to review the Sixth Circuit's decision in *Muhammad v. Close*, No. 02-1043, 47 Fed. Appx. 738 (6th Cir. Sept. 23, 2002), *cert. granted*, ___ S. Ct. ___, 2003 WL 548900 (U.S. Jun. 16, 2003) (No. 02-9065). The questions presented in *Muhammad* are (1) whether a plaintiff who wishes to bring a §

1983 suit challenging only the conditions, rather than the fact or duration, of his confinement, must satisfy the favorable termination requirement of *Heck v. Humphrey*; and (2) whether a prison inmate who has been, but is no longer, in administrative segregation may bring a § 1983 suit challenging the conditions of his confinement (i.e., his prior placement in administrative segregation) without first satisfying the favorable termination requirement of *Heck v. Humphrey*.

The questions presented in *Muhammad* are related but not identical to the question presented here. Indeed, Respondent in this case asked the Court of Appeals to decide the issues presented in *Muhammad*, and find *Heck* did not bar his separate challenge to placement in administrative segregation because *Heck* applies only to claims challenging the fact or duration, and not conditions, of confinement. (Pet. App. A at 13-14.) But the Court of Appeals did not go so far. Instead, it held, despite Respondent's failure to make the argument in the district court, *Heck* does not bar *any* of his claims and it need not address whether he failed to establish an independent ground for precluding application of *Heck* to his administrative segregation claim because he is without an available remedy in habeas. (*Id.*)

This Court's decision to grant certiorari in *Muhammad* signals a growing concern with the traffic jam which has once again formed at the intersection of the federal civil rights and habeas corpus statutes. The issues in *Muhammad* and this case are naturally complimentary. *Muhammad* allows this Court to determine *which* claims are subject to *Heck*'s favorable-termination requirement (conditions of confinement, and specifically administrative segregation), while this case allows this Court to determine *when* claims are subject to the *Heck* rule (always, without exception, or only when habeas relief is available). A decision from this Court in both cases will help lower courts negotiate the uncertain crossroads of § 1983 and the habeas statute.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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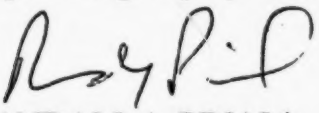

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